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No. ~~2425~~

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KEANE WONDER MINING COMPANY
(a corporation),
Plaintiff in Error,

vs.

JAMES CUNNINGHAM,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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F. D. Monckton,
Clerk.

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I.

General Statement of the Case.

This writ of error is prosecuted from a judgment of the United States District Court of the District of Nevada.

It is sought to review the judgment of that Court entered pursuant to the verdict of a jury, awarding defendant in error, James Cunningham, the sum of twelve thousand five hundred dollars as damages for injuries sustained by him on December 9, 1911, at Keane Wonder, Inyo County, California, while in the employ of Keane Wonder Mining Company,

the plaintiff in error, hereinafter referred to as "Mining Company". Judgment was entered and sustained in the Court below upon the theory that the injuries to Cunningham were the result of the want of ordinary and reasonable care of the Mining Company in the operation of its mine at Keane Wonder, where Cunningham was employed,—the contention being, in substance, that the Mining Company caused and permitted Cunningham to work in a certain stope in said mine, while said stope was in a dangerous condition due to the negligence of the Mining Company in not properly timbering same; in not properly examining and inspecting same, and in not properly picking or barring down loose rock or ore at the roof or top of said stope.

After the entry of judgment, the Mining Company moved for a new trial, which motion was heard in the Court below on March 14, 1914, and denied. Said motion for new trial was made upon three grounds, to wit:

1. That the evidence in the case is wholly insufficient to justify the verdict of the jury or to sustain a judgment entered thereon.

2. That said verdict and said judgment were and are against law.

3. That the verdict of said jury in favor of plaintiff in the sum of twelve thousand five hundred dollars was and is excessive damages appearing to, and which were given by, the jury under the influence of passion or prejudice.

Plaintiff in error presents the question and challenges the sufficiency of the evidence to sustain the judgment. At the outset, it wishes the Court to understand that it is fully advised that the granting or denying of a motion for a new trial is, in general, a discretionary matter with the Court below, and that ordinarily, this Court will not review such an order *unless it be manifest* that the order made in relation thereto, was and is an abuse of discretion. The denial of the Mining Company's motion for new trial was and is an abuse of discretion, for the reason *that there is no evidence of any negligence* on the part of the Mining Company which resulted in or contributed to the injuries sustained by Cunningham, for which the jury awarded him twelve thousand five hundred dollars. The judgment of any Court can only be upheld when there is legal and sufficient evidence to sustain it.

The questions of law to be reviewed on this appeal are comparatively few, and can best be understood by a statement of the facts in chronological order.

THE PLEADINGS.

Admitted Facts.

It is admitted by the pleadings that plaintiff in error was and is a mining corporation organized and existing under and by virtue of the laws of the State of Arizona, and at all the times mentioned in the amended complaint, owned and operated a cer-

tain mine in Inyo County, State of California, commonly known as the "Keane Wonder Mine". That Cunningham was engaged and employed by said Mining Company as a miner and mucker in said mine, and on the 9th day of December, 1911, while in said mine, a body of ore and rock fell upon him and broke his left leg, and otherwise bruised and scratched him.

It is admitted that it was and is the duty of the Mining Company to furnish Cunningham, and all other employees, a safe place to work, and safe ways, works, machinery and appliances therefor, and that it was and is the duty of said Mining Company to use ordinary and reasonable care in its methods of operating said mine and in extracting the ore and rock therefrom.

Amended Complaint.

The amended complaint alleges that while Cunningham was in the employ of said Mining Company, as aforesaid, and while at work in said mine, in the line of his duty and in the course of his employment, that a mass of ore and rock fell from the top or roof of a stope, upon him, by reason of which he was scratched, bruised and wounded, and his left leg broken and splintered.

The negligence attributed to the Mining Company is alleged as follows:

> "But defendant, by and through its own negligence and the negligence and carelessness of its officers, agents and other servants, failed and neglected to furnish plaintiff with a safe

place to work, and safe ways, works, machinery and appliances therefor, and failed and neglected to exercise ordinary or reasonable care in its methods of operating said mine, and extracting the ore, rock and other materials therefrom; but on the contrary, the defendant, its officers, agents and other servants, negligently and carelessly drove a certain stope upward from a tunnel situated in said mine, and failed and neglected to use ordinary or reasonable care in the examination and inspection of the roof or top of said stope, and failed and neglected to pick or bar down from said roof or top of said stope, loose rock and ore therein or thereat, and caused and permitted the said plaintiff to work, in the course of his employment, in said tunnel at the bottom of said stope *while said stope was in a dangerous condition owing to the negligence of the defendant, its officers, agents and servants, in not properly timbering the same, and in not properly examining and inspecting the same, and in not properly picking or barring down the loose rock at the roof or top of said stope,* by reason whereof a mass of ore and rock fell from the top or roof of said stope on and upon plaintiff, etc."

(Tr. p. 10.)

The sum and substance of the allegations of alleged negligence being in three assignments, to wit:

1. *In not properly timbering said stope.*

2. *In not properly examining and inspecting same.*

3. *In not properly picking or barring down the loose rock at the roof or top of said stope.*

It is conceded that the injuries of which Cunningham complains, and for which he recovered

judgment, were sustained by him in the State of California, and accordingly, it is alleged that at the time of the injuries, there was in effect in said state a certain statute applicable thereto, making contributory negligence a defense by comparison only, and abrogating assumption of risk and the fellow-servant rule as defenses in actions of this character (Tr. p. 12). The act referred to is generally known as "Roseberry Liability and Compensation Law of California" (Stats. 1911, p. 796), and that part thereof applicable to this case is as follows:

> "Sec. 1. In any action to recover damages for personal injury sustained within this state by an employee while engaged in the line of his duty or the course of his employment as such, * * * in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *; and it shall not be a defense:
>
> 1. That the employee either expressly or impliedly assumed the risk of the hazard complained of.
>
> 2. That the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant."

Answer.

The answer admitted that it was the duty of the Mining Company to furnish its employees safe places to work and safe ways, works, machinery and appliances therefor, and that it was its duty to use ordinary and reasonable care in its methods of operating said mine and in extracting the ore and rock therefrom, and it averred that said company did use ordinary and reasonable care in operating its said mine.

All the allegations of the amended complaint charging negligence are denied.

Separate defenses are pleaded, the third setting up that the injury to Cunningham was without fault or negligence on the part of said Mining Company, and was the *result of the risk or danger assumed* by him in his said employment, and that he knew, or ought to have known, all the risks and dangers incident thereto, and particularly the risks and dangers necessarily resulting from the falling of loosened rock at the roof or top of any stope in the mine (Tr. p. 21).

The fifth defense alleges that the injury to Cunningham was occasioned by causes purely accidental, and by no reason of negligence or want of ordinary or reasonable care on the part of said Mining Company (Tr. p. 23).

The sixth and last defense avers that the injuries to Cunningham occurred in the State

of California, and that at the time, said Mining Company was not and is not now engaged in business in the State of Nevada, and did not, and does not now, maintain an office therein, and that its principal office and place of business was and is in the State of California. That said Cunningham, by his said action, seeks to enforce a right given him under and by virtue of a law of the State of California (above referred to), which said law is materially and fundamentally different from the law of the State of Nevada in relation to the same subject, and that he should not be allowed to assert and enforce in the United States District Court for the District of Nevada, a right given him under the law of the State of California, which is materially and fundamentally different from the law of the State of Nevada in relation to the same subject (Tr. p. 23).

At this point we particularly direct the Court's attention to the fact that the law of the State of Nevada, in effect December 9, 1911, *allowed and permitted* in that state, in actions of this character, *the defense generally known as assumption of risk,* though in this action the Court below struck out such pleaded defense and instructed the jury that assumption of risk was not a defense that could be considered by them. The Nevada law will be hereafter quoted, in extenso, in our argument covering this point (Tr. pp. 250-1).

Proceedings:

With the issues thus framed, the case was brought on for trial before a jury on the 19th day of November, 1913, whereupon, upon motion of counsel for defendant in error, the third defense above referred to (assumption of risk) was stricken from the answer (Tr. p. 54), to which ruling an exception was duly taken and allowed (Tr. p. 55).

At the conclusion of the evidence for defendant in error (hereinafter set out), plaintiff in error moved for a directed verdict or a nonsuit upon various grounds (Tr. p. 135), which motion was by the Court denied, and to which ruling an exception was duly taken and allowed (Tr. pp. 134-140).

At the conclusion of all the evidence, plaintiff in error renewed its motion for a directed verdict, but same was denied and an exception allowed (Tr. p. 244).

Thereupon the Court instructed the jury, among other things, as follows:

> "The injury complained of occurred in the State of California, consequently we are governed by the law of that commonwealth in the particulars which I shall indicate. Formerly in California it was the law that the employee assumes the ordinary risks of his employment, and that he could not recover if he were himself guilty of contributory negligence, which negligence directly caused or contributed to cause the injury, or if the injury was the result of the negligence of a fellow servant. This has

been changed by the statute of that state. Now in any action to recover damages for personal injury sustained in California by an employee while engaged in the line of his duty or in the course of his employment, on the ground of the want of ordinary or reasonable care of the employer, or of any officer, agent, or servant of the employer, it shall not be a defense that the employee, either expressly or impliedly, assumed the risk or the hazard complained of, or that the injury was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant.

Furthermore, the fact that such employee himself may have been guilty of contributory negligence, shall not bar a recovery therein, where his contributory negligence was slight and that of the employer was gross in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee.

If you find from the evidence that said injury to plaintiff resulted from contributory negligence on the part of the plaintiff, and that no negligence is proven or established on the part of the defendant, or that the negligence on the part of the defendant, if any, is not gross in comparison with the negligence established on the part of the plaintiff, then I instruct you that if the plaintiff is guilty of contributory negligence which is more than slight negligence, he cannot recover.''

(Tr. pp. 250-1.)

To the giving of which instruction plaintiff in error then and there entered its objection, but same was overruled and exception allowed (Tr. p. 258).

EVIDENCE PRESENTED BY DEFENDANT IN ERROR.

James Cunningham, defendant in error, testified, in substance, as follows:

"I was born in 1881. I first started to work in the mines in the latter part of 1906. I have worked in different mines, including Tonopah Extension, Mohawk, Johnnie Mine, and Mizpah Mine. I went to work for Keane Wonder Mining Company about October 9, 1911. On December 9, 1911, I went on shift at half past seven in the morning. The work which I began to do on that day was mucking. After working some time, Mr. Roper, the foreman, put me to work at the place where I was hurt, and I put in a switch there. *We finished putting in the switch near noon, when Mr. Roper, the foreman, said he was going to the Whipsaw and left me working there,* with instructions to put in a set of rails when there was room. I worked shoveling into a car until about ten minutes to four, and I was just throwing a shovelful into a car, and I was caught and knocked over a little bit, and was just caught in that position, just tipped over, and to the left of me, the rock kept falling down, and it raised up six or seven feet, then it rolled down on my left side, so from this side I was covered up from about here; I heard Mr. Porter hollering over on the other side; there was three or four muckers there who came and took me out, and when they rolled the rocks off of me, they found this leg broken. It was a slab of ore, a slab of rock which struck me which came from the roof. The roof was about sixteen to twenty feet above my head; approximately seventy ton of rock fell. The only place that I ever worked in that mine was in that stope. The ore which I was shoveling at the time I was injured was broken down by machine, a shift or two before that; some of

it maybe there a week. The vein or ore body varies from twenty to sixty feet. It is a flat or blanket vein. The thickness of the ore at the place where I was injured, from the foot-wall to the hanging-wall, was close to twenty-five feet. The ore or rock that fell on me fell from the top over my head. *The roof of that stope was not supported by anything.* At the place where I was injured there was no timbering, and there was no means whatever in use at that time to keep the rock from falling. Roper was the foreman and he directed me to work at the particular point where I was injured. *Mr. Roper was working with me that morning for two or three hours at the place I was injured.*

I did not make any examination of the roof of that stope or the place where I was injured. The roof at this place was about sixteen feet above my head, and there was no means there by which I could have reached the roof to examine it. Mr. Roper did not make any examination of that roof that morning.

Mr. Keith was the superintendent at that time. He was in the mine on the morning of December 9, 1911. My partner, Mr. Perez, was working ten or twelve feet from me at the time I was injured. There was also three or four Mexicans close by.

Cross-Examination.

Q. Were there any pillars in there?

A. Yes.

Q. Was there any timbering in there?

A. Yes, there was a few stulls in the stope. It was a pretty large stope.

Q. Was the roof of the stope protected by pillars or by timbers?

A. No, sir.

Q. It wasn't protected at all?

A. Not where I was working.

Q. How large was the stope where you went to work that was not protected, either by pillars or timbers?

A. Well, there is a few pillars in the stope, and a few stulls.

Q. *Then there were some pillars in the stope?*

A. *Yes.*

Q. What are the pillars?

A. Part of the ore left.

Q. And what is it left for?

A. It is left to protect the mine.

Q. To protect the mine. It stands there then a solid body of ore or earth, to hold up the roof of the stope, doesn't it?

A. That is what it is left for.

Q. *And where there is one left there is no use for any timbers, is there?*

A. *Oh, yes, you have got to timber it.*

Q. *Always—do you always have to timber it?*

A. *It all depends on how wide them pillars is.*

Q. *Precisely; and the width of the stope?*

A. *And the width of the stope."*

(Tr. p. 70.)

"Q. Do you remember, Mr. Cunningham, how many pillars there were at the point where you were hurt on December 9th, 1911?

A. Well, there was some pillars there quite a distance away from one side, *and I was close to a pillar on another side.*

Q. At the time you were hurt, the work was on the face of the ore body?

A. Yes. *We would leave several pillars all over the stope there.* The cave was here at this switch; it covered the switch. About seventy tons of rock fell. I don't remember just how many pounds there are in a ton. I don't know how many cubic feet there are in a ton of ore.

When I said seventy tons, it was a mere matter of guess.

Q. *You know there were pillars in that mine?*

A. *Yes.*

Q. *You know what they were left there for?*

A. *They were there to protect the mine.*

Q. They were there to protect the mine and to protect the roof of the mine?

A. Yes.

Q. And to prevent the falling of the roof on to the floor of the stope?

A. Yes."

(Tr. p. 75.)

"The height of the stope from the floor to the roof was from twenty to sixty feet, I believe. I am just guessing at that.

The mucker takes away the muck that has been thrown down by the explosions. *After firing the shots which breaks down the ore, the miner goes in first and bars down the loose rock, and he tells the mucker when it is safe for him to come in.*

Q. Now then, when you went in there who was the miner where you went to work mucking?

A. *That ground that fell down, I think it was hanging there for about four days.*

Q. What do you mean by hanging four days?

A. It was hanging up to the hanging-wall there; it was four days from the last miner had worked there.

Q. *And did you observe it when you went in?*

A. *No, I didn't pay no attention to it.*

Q. *You didn't look at it at all to see whether it was loose or not?*

A. *No, sir.*

Mr. Roper took me in there to work, and I thought it was all right; Mr. Roper said nothing to me at all. *Me and him put in the switch.*"

(Tr. p. 77.)

"Q. *You know nothing and heard nothing and saw nothing that would indicate that the roof of the stope there was loose at all?*

A. *No, sir.*"

(Tr. p. 78.)

"The morning shift of muckers would go down and remove the muck broken down by the night shift machine men, *and before sending the muckers to work, the foreman would send a miner there first to bar down the loose rock and inspect the roof.*"

(Tr. p. 80.)

"Q. Well, the night shift was cleaning away the muck that had been created by the machine men of the day shift?

A. Not always; when them four men would go on shift, *the foreman would go there with them;* either that, or *he would send a miner, and sometimes he would bar down that loose rock himself and see that the place was what he thought safe before we would go in there to work. That is what they were doing.* That is what they did in all other mines that I worked in. I had no conversation with anybody about whether it was safe or not to work there. When the foreman sent me in there I thought it was all right. *No one told me anything about it one way or another.* Mr. Roper worked with me in putting down this switch. The nearest machine was Old Mack,—*about fifteen feet from me.* At the time the top of the roof of the old stope fell down, I was just throwing a shovelful of dirt into the car. *I was caught so*

quick there was no chance to get away; it just fell like a flash of lightning.

Q. *Did you have any warning, or hear any noise, or know anything about it, until it occurred?*

A. *No, sir.*

Q. During the time that you were working there, did you ever make any request for any timbers, or anything to be done by your employers in the way of protecting the mine?

A. *No, sir.*

I didn't notice whether any injury was done to the car that I was throwing ore into. *I was about three or four feet from the car. I don't know how many pillars were left to protect the roof."*

(Tr. p. 82.)

"Q. *Well now, I will ask you plainly, is it not a fact that there were three pillars, and that this caving took place so that it fell down between these three pillars, which were very close together?*

A. *Oh, it is quite a distance between them pillars.* Where Mack was working it was a block of ground, constituting a pillar in itself. I was hurt pretty close to where Mack was. I was about fifteen feet from where he was. All of that unworked ground where Mack was working was a pillar. At the point where I was hurt, there was about five or six feet of ore sticking up on the hanging-wall. It was worked out where I was standing except for the ore sticking up to the hanging-wall.

Q. *Now that was worked out at that point, and at that point were there not three pillars very near by?*

A. *No, not that I know of. There was a pillar close to where Porter was."*

(Tr. p. 84.)

"Q. Now, from that point where Mack was working, how far was it to the first pillar nearest to you which had been left in the territory that had been worked out?

A. *It would be ten or twelve feet.*

Q. Now then, that pillar would be how far from where Mack was working?

A. *Oh, it would be over twenty feet I guess.*

Q. Weren't there three near by, not over fifteen or twenty feet apart, running in a sort of a triangle from one point to the other, in the three pillars?

A. Not the way it looks to me.

Q. I don't care how it looks to you; I want to know whether it is a fact or not.

A. Well, I am stating to you as clear as I can what I know.

Q. *Do you really know very much about this underground place where you were at work?*

A. *No, I don't.*"

(Tr. p. 85.)

At the point where I was hurt, I think the stope would be about twenty-five feet, from wall to wall. *I never measured it or saw it measured. You could see ore in the top of the stope. It was a kind of gray colored quartz. The schist hanging-wall was a dark color. You could easy see it was waste, though.*

Q. Mr. Cunningham, you have stated that the stope was a good deal larger than this room; will you state approximately how large that whole stope is, or was at that time?

A. Well, to walk right around it as it is there I think it would be about six hundred feet."

(Tr. p. 88.)

"There were timbers at the chutes.

Q. That is, the chute timbers ran clean up to the hanging-wall?

A. Yes.

Q. How long were those chute timbers, do you know?

A. Well, where the chutes was they would be—oh, *I think about ten feet.*"

Dr. E. A. Wheeler, a practicing physician and surgeon, testified as follows:

"I attended Cunningham for the injury complained of, and operated on his leg, and attended him until he was discharged from the hospital. In my opinion he is able to do a fair amount of work, but he is not able to do the heavy work around a mine; however, he is not totally disabled. There will be some disability, and he will have to wear a thick shoe, because of the shortening of the leg. I and my assistants and the hospital bills were paid by the Keane Wonder Mining Company. The injury to Cunningham is not such that it will affect his general health in the future."

(Tr. pp. 90-92.)

Mat Dropulich testified as follows:

"I have been a miner for about five years. I was working at the mine at the time of Cunningham's injury, but I was not working on the day that he was hurt. I worked in the same stope afterwards. The space between the floor of the stope and the roof is from fifteen to twenty feet.

Q. *How was the roof of that stope supported?*

A. *Well, the roof, I want to tell you that place ain't exactly—I can't tell you whether the roof was solid or soft or loose, I can't tell you that exactly.*

Q. Well, was there anything to support the roof to keep it from falling?

A. You mean timbers?

Q. Yes; or anything else?

A. What I can remember, I didn't see timbers in that stope; I cannot remember, I would not tell you exactly about that.

Q. *Was there anything else there to support the roof at that point?*

A. *There was some kind of pillars.*"

(Tr. pp. 93-94.)

"Cross-Examination.

After shots have been fired breaking down the ore body, a miner goes to the place first. *Miner got to go to the place and see if there is any loose rock.* Mucker goes after; mucker have no right to pick it down; it is all the miner's business. Muckers have no business to take a pinch-bar and strike the surface, and find out whether the rock is loose.

Q. Now, you say the first workman that goes into the mine after the shots have been fired is a miner?

A. Miner—work all together; miners come first to the place.

Q. *What does the miner do then?*

A. *Oh, he take a pick or something, machine or something, just to rap the roof to see whether it is loose.*

Q. That is all a miner does in a mine?

A. When he go to the place, the other place, then, to see whether loose or not, and then drill them out."

(Tr. p. 95.)

"There were some pillars in the stope, but not very much pillars.

Q. Do you know anything about mining?

A. I know anything about work, but I don't know anything about mine.

Q. You wouldn't know a mine, I suppose, if you saw it, would you?

A. If I saw it?

Q. *Yes, if you saw a mine you wouldn't know it?*

A. *Well, nobody could know. You see that position is pretty hard to tell; if it is a lot loose you would know something, but if it is a little loose nobody would know.*"

(Tr. pp. 99-100.)

"Redirect Examination.

Q. Mr. Dropulich, you stated in answer to Senator Morehouse that there were some pillars in the stope, pillars of ore supporting the roof.

A. He was some pillars, yes; pillars of ore, yes; I am sure that way, but I can't tell you how many pillars there was."

* * * * *

Louis Guerra testified:

"I have been working in mines for eleven years. I was working in the Keane Wonder Mine in the month of December, 1911, as a mucker. On the afternoon of the day that Cunningham was injured I was working about twenty or twenty-five feet from him, and the first thing that attracted my attention to Cunningham's injury was the cave.

Q. In what position or condition was Mr. Cunningham when you first saw him after the cave?

A. *He was covered in rock about up to his knees, lying on his side.*

Q. *Who helped dig Mr. Cunningham out of the rock, if you know?*

A. *I did and my partner.*"

(Tr. p. 105.)

"The part that fell and caved on him was a mixture of waste and metal; as near as I can

tell or estimate it, about sixty cars fell. There were no stulls or timbers supporting the hanging-wall at or near where the rock caved.

Cross-Examination.

Q. *How many pillars were there where Mr. Cunningham was hurt?*

A. *Two pillars.*

Q. Were they large or small?

A. Oh, regular size.

Q. Regular size. How far from the pillars was Mr. Cunningham hurt?

A. About twenty-five or thirty feet.

Q. *Was there a car track near there?*

A. *A car track passed in the middle.*

Q. That car track passed in the middle, that is, between the pillars?

A. Yes, sir.

Q. *Where the waste rock with mineral fell down, was that roof of the stope or hanging-wall protected with pillars?*

A. *The pillars were there, but they did not stop the cave.*

Q. How far from the pillars did the cave come down?

A. About twenty-five or thirty feet."

(Tr. pp. 106-107.)

"About forty or fifty feet from where I was working there were other pillars besides these two. Immediately following the accident I saw a car standing on the track, about ten or twelve feet from the pillar."

(Tr. p. 108.)

A. Perez testified:

"I was employed in the Keane Wonder Mine in December, 1911, as a mucker. I have worked in mines since 1902. At the time of the cave and the injury to Cunningham I was working about the length of a rail from him.

Q. Length of a rail, and that is about how many feet, as near as you can tell?

A. Well, I think that rail was fourteen feet long.''

(Tr. p. 108.)

''At the time of the accident I was shoveling rock into the car. Mr. Cunningham was between me and the chute. What first called my attention to Mr. Cunningham being injured, was a crash, which sounded to me like a blast. I heard Cunningham asking for mercy. *Then I went and found him with his legs wedged among rocks,* and we throw out the rocks, and then went to help Porter; he was held against the pillar. Cunningham's leg was broken. I didn't notice any other injuries upon his person other than some bruises and red spots around the arms or wrists.

Q. Were there any timbers or stulls supporting the hanging-wall at the place or near where Mr. Cunningham was injured?

A. Well, there were *two stulls* hanging the chute frame, *another stull,* I think, to the right hand of switch, a little ways, probably over ten feet, from ten to fifteen feet.

Q. Ten or fifteen feet from where?

A. From the switch.

Q. And the two stulls——

A. (Intg.) *And another one,* well, about the same distance, from ten to fifteen feet.''

(Tr. p. 110.)

''There were no timbers or stulls supporting the hanging-wall right at the place where he was injured.

Cross-Examination.

I am familiar with the car track there and the little switch that ran off from the car track. *Mr. Roper and Mr. Cunningham built this little switch.*

Q. Right at this point or very near this point where Mr. Roper and Mr. Cunningham laid this little switch, were there any pillars?

A. Well, I suppose that track was shooting between a pillar and a body of ore, after while they cut a pillar there in the far corner.

Q. How far apart were these pillars near the place where the accident occurred?

A. Oh, well, the first pillar was close to the track, and the other pillars were too far away from there. The nearest pillar there was where Mr. Porter got caught. That was maybe fifteen feet, and maybe more, and maybe less, from where Cunningham was hurt. That was the first pillar nearest to Cunningham.

Q. You stated something about Mr. Porter being pinned up against a pillar?

A. *No, Mr. Porter was caught in the pillar closest to the switch where the hanging-wall fell.*

Q. How far was that pillar where Mr. Porter was caught from where Mr. Cunningham was hurt?

A. I could not tell exactly."

(Tr. p. 113.)

"That afternoon I had been working in the mine on or about the place where Mr. Cunningham was hurt. On that day they were working on the face of the ore body; three machines were working. All the balance of this stope, except the face of the ore body, had been worked out before, that is, to the left hand side of the stope. *There was no more hanging-wall working, except at the place where we were working that day.*

Q. There was some hanging ore then on the hanging-wall at the place where you were working that day?

A. *Well, there was hanging ore where I worked that afternoon.*

Q. *And that was how far from where Mr. Cunningham was at work?*

A. *In the same place.*

Q. Now what were you doing when the accident occurred?

A. Oh, I was shoveling in the car.

Q. And what was he doing?

A. Well, when I saw him, he was with his shovel in his hand. I guess he was shoveling back of me, *shoveling coarser stuff in the car,* and the finer stuff between the ties of the track we lay that afternoon."

(Tr. pp. 114-115.)

"It was the piston machine was breaking ore ahead, and this ore would be thrown back from the piston machine, and I was taking up this ore and throwing it into the car, to be rolled out to the chute. After a blast is fired off by the miner, or machine man, if he shoots between half past seven in the morning, and half past four in the afternoon, then a miner will go back.

Q. But if he shoots at any other hour, then what does he do?

A. If he shoots at a different time, the night shift will look after it."

(Tr. p. 115.)

"Q. If he shoots at quitting time, he goes off shift entirely?

A. Yes, sir.

Q. And that muck is left there?

A. Yes.

Q. And the next morning he goes in to remove it?

A. Probably the same man.

Q. Probably what man?

A. The same miner that shoot the day before.

Q. *A miner is a mucker, is he?*

A. *He have to go there to see the country.*

Q. What would be the use of the mucker if the miner goes back and mucks himself?

A. I never tell you that.

Q. I know you don't; I am asking you if that is so?

A. *The miner goes back to see the country, and if he says it is all right, the mucker go after and shovel in the car.*

Q. *The mucker don't go to work until the miner comes and tells him to go?*

A. *He go at the same time, probably he can do something around till the place is safe to work underneath.''*

(Tr. p. 116.)

"Q. The foreman is not there all the time, is he?

A. Well, supposed to be.

Q. He is supposed to be in there all the time?

A. Supposed to make his rounds.

Q. I see. *This man Roper made his rounds regularly, did he?*

A. *Yes.*

Q. *And he was foreman?*

A. *Foreman, yes.''*

(Tr. p. 117.)

"Redirect Examination.

Q. Under whose immediate order was Mr. Porter, the machine man?

A. No, the machine man had no orders to give to us at all, because he goes on shift, and he has to drill his rounds.

Q. And then he went off shift?

A. Yes, and then got off shift.''

(Tr. p. 118.)

Frank Porter testified as follows:

"I am a miner and have been in the business four or five years. On December 9, 1911, I was employed in the Keane Wonder mine as a machine man, running a piston machine. I was working at the same place Cunningham was hurt. The first thing that I did on that day was to go to the place where they blast the day before, and after Mr. Roper come up and see what place to set out the machine, he say to go muck, clean him up; he give me Mexican help, and he say when I get through to set up my machine."

(Tr. pp. 118-119.)

"In the afternoon I broke one of the bolts on my machine, and I come past where Cunningham was at work to find a new bolt, and at that time it all cave down; it get me and I don't know what it was; they work like the devil and they begin to get me out."

(Tr. pp. 120-121.)

"Q. Do you know where the rock fell from?
A. From the roof.
Q. What kind of rock was it that fell?
A. Metalli. Well, I know it was ore. I don't know if the waste come down; I know it was ore because it drill that way—the piston machine it take about six or seven foot, and after, when you get inside, about six or seven or eight foot, *use the Waugh machine to knock down the roof.* The first thing you get the piston machine set up, and after seven or eight foot high, you use the Waugh machine, cause the ore is too high, cause you can't set up your bar if it is too high."

(Tr. p. 121.)

"There were no stulls in the place where the rock fell.

Q. How far from the place where this rock fell was the nearest stull?

A. Well, there was that two timbers in the chute, afterwards the pillar—there was one pillar afterwards—some stull on the other side, some stull where you dump the car.

Q. Then the pillar you refer to was between the chute and the other stull you mean?

A. Yes, there was one pillar after this side —the other side that stope—the other side the other stope there was some timber.

The COURT. Perhaps you understand it; I don't."

(Tr. pp. 122-123.)

"Q. *As a machine man in that mine, working as you say, under the directions of Mr. Roper, whose duty was it to bar down or pick down or sound the rock after a blast to see whether it was safe, or to make it safe—whose work was it—whose duty was it to do that?*

A. *Well, I have to do it; it was my place if you see any loose ground.*"

(Tr. p. 124.)

Dr. M. R. Walker testified as follows:

"I am a practicing physician and surgeon, residing at Reno, Nevada. I made an examination of Cunningham and found that his left leg had been badly injured. In my opinion, the result of the injury has destroyed about seventy-five per cent of his efficiency as a common laborer.

Cross-Examination.

The result of the medical treatment given Cunningham has obtained reasonably good results."

(Tr. pp. 124-130.)

J. W. Legate, deputy secretary of state, produced a document on file in the office of the secretary of state, filed June 15, 1907, being "Designation of State Agent Keane Wonder Mining Company".

(Tr. pp. 130-134.)

Whereupon defendant in error rested his case, and thereupon plaintiff in error moved the Court for a directed verdict or a nonsuit:

> "2nd. Upon the further ground that the action is based upon a statute of the State of California of April 8, 1911, and that it appears from the testimony in this case that the injury upon which the action is founded occurred on the 9th day of December, 1911, in Inyo County, State of California; and that the act in question is contrary to the public policy of the State of Nevada, and therefore the Court will not, under the law of comity, permit the suit to be prosecuted in this state.
>
> And for the further reason, under this subdivision of the motion, that it appears from the evidence that the mining property, and the place of business conducted and carried on by the Keane Wonder Mining Company, is in Inyo County, California, and that the defendant, Keane Wonder Mining Company, at the time of the accident was, and ever since has been, engaged in business in Inyo County, State of California, and has never removed from that State into the State of Nevada. So that the plaintiff, having the right of service of process, the prosecution of his cause of action in California, and the property of the Keane Wonder Mining Company being situated there, that a judgment recovered there could be enforced under the laws of the State of California, and cannot be enforced, if recovered in the State of Nevada.

4th. That the evidence in this case utterly fails to establish any negligence on the part of the defendant; that we have no evidence, except of the bare fact of an injury or accident, and that that does not establish negligence, either as proof or as a presumption, in this class of cases; and that the consequence of that upon this motion, standing in the nature of a demurrer to the evidence, it becomes a question of law for the Court, and not a question of fact for the jury."

(Tr. pp. 135-137.)

At this point we direct the Court's attention to the opinion of the learned trial judge in denying the motion. A careful reading of this opinion, we submit, clearly reveals the insufficiency of the evidence to establish any negligence of the Mining Company which in any way contributed to the injuries complained of.

This Court will note that every condition which, if established by evidence, might or would constitute a fact establishing or tending to establish negligence on the part of the Mining Company, is found by the lower Court either not to be established by the evidence, or if attempted, to be supported by such slight evidence as to amount only to an inference or a conjecture, and not sufficient in law to sustain the burden of proof which the law throws upon the party seeking recovery.

It is only in the last paragraph of the opinion that the Court below concludes that there is any testimony in the case showing negligence. The Court's conclusion in this regard will be discussed

hereafter, and we hope to be able to demonstrate that it is based upon an erroneous application of certain principles of law; in other words, the Court below, in effect, necessarily applied the doctrine of *res ipso loquitor* in determining that there was negligence on the part of the Mining Company.

For the Court's convenience, we quote the opinion of the Court below:

> "I shall not go into this motion at any length. I will simply state as briefly as I can my reasons for overruling it. In my judgment, this action is not brought under the act of April 8th, 1911. The right to bring such an action was granted by previous law of California. Plaintiff here has simply sought to avail himself of the provisions of the act of April 8th, 1911, which deprives an employer of certain common-law defenses.
>
> It is apparent that defendant has submitted itself to the jurisdiction of this court. What might have been the result if other action had been taken when the suit was brought, is unnecessary to say. Whatever objection defendant had to the jurisdiction of the court over its person has been waived.
>
> The difference between the California statute and our own law is not sufficient to prevent this court from taking jurisdiction. It is a well-established rule in cases of this kind that a defendant cannot be compelled to pay damages, and there is no case against him, unless the injury resulted from negligence. While the injury itself, under some circumstances, is evidence of negligence, it must appear, in order that it may have that effect, that the accident could not have occurred, unless there was negligence on the part of some one—unless from the happening of the accident, it is very prob-

able that it could not have occurred except by the negligence of the defendant.

Much has been said in the course of the trial about the failure to promulgate rules. There are many decisions holding that the failure to promulgate rules is negligence, but when counsel for plaintiff was asked during the argument what rule could have prevented this accident, his only suggestion was a rule forbidding employees from going into dangerous places. Such a rule would hardly be serviceable. If defendant is to be held for negligence in failing to provide a rule, some connection must be shown between failure to provide a rule, and the accident; it must appear, in some way, that the failure to provide a rule caused the injury.

If the company had been negligent in the construction of its hoisting works, for instance, it might have been the grossest sort of negligence, but it could not be regarded here as a reason why the plaintiff should recover, unless it were shown that the defect in the hoisting works in some way caused this ore to fall.

There is no showing that any of the employees were incompetent. Much was said about the failure to give warning. When the duty to warn is present, it necessarily predicates, not only that there is danger, and reasonable cause therefor, but it also predicates the fact that the party upon whom the duty is laid, must know of the danger, or must have some cause to apprehend it, or could have discovered it if he had performed his duty.

There is no evidence here showing conclusively that the defendant failed to inspect this roof. True, Mr. Porter says it was his duty to do it, and there is testimony showing that Mr. Roper didn't do it; still it is not necessary that the company should have performed its duty through these people. Mr. Wilson himself

might have performed the duty; others might have performed it, hence the failure to inspect does not seem to me to have been established.

It appears from the testimony that the accident was caused by the falling of a body of ore —something like sixty tons—which it is alleged could not have occurred if the roof had been properly supported. This no doubt is true. If there had been a support under the ore, it probably would not have fallen, but, so far as the evidence shows, such an accident never occurred before. It does not appear from the testimony that any ore or rock ever fell from the roof of that chamber before. The chamber was in the neighborhood of six hundred feet in circumference; it must have been something like two hundred feet in diameter. At points, the roof was twenty feet from the floor; at others it was in the neighborhood of sixty feet. The supports and pillars were few in number; but, in the absence of any showing that these were insufficient, I do not see how we can assume there was any negligence on that score. If it had appeared that caves were frequent, then there would have been evidence tending to show the company was negligent in failing to have proper supports for the roof, but there is nothing of that sort here.

It seems to me the only testimony conveying a definite idea that defendant was negligent, was the falling of the ore body itself. It is not my duty to weigh the testimony; it is simply for my determination, as a question of law, whether there is any testimony showing negligence. Now, here is a large chamber; at the point where the accident occurred the hanging-wall was twenty-five feet above the foot-wall, and an enormous body, sixty tons of ore, were left on the hanging-wall. It seems to me

that in itself, was negligence; at least it is a fact tending to show negligence. On the existence of that fact I hold there is testimony here showing negligence. The motion is denied."

(Tr. pp. 137-140.)

EVIDENCE INTRODUCED BY PLAINTIFF IN ERROR.

Homer Wilson testified as follows:

"I reside at Keane Wonder, California. I am the President and General Manager of Keane Wonder Mining Company. I am thoroughly familiar with the underground workings of the mine, and was familiar with them on December 9, 1911. John Keith is the Superintendent, and George Roper the foreman.

On the day after the accident to Cunningham, John Keith and I went into the mine and made a map of the underground workings by actual survey.

(The witness produces map.)

I know of my own knowledge that this map is absolutely accurate and correct."

The map was introduced in evidence, marked "Exhibit A", a copy of which is attached to, and made a part of the transcript at page 265.

The witness also produced a map representing the cross-section through tunnel No. 5, and a cross-section map through shafts and tunnels numbers 1, 3 and 4, which was introduced in evidence and marked, respectively, "Exhibit B" and "Exhibit

C", copies of which are attached to and made a part of the transcript at pages 266, 267.

(Tr. pp. 142-144.)

"On December 9th there were three piston machines in operation in the mine."

Witness located on the map the place where Porter's machine was operating, and marked same by the letter "P" and a cross. Also marked on the map place where the machine was operated by Mack with the letter "M"; and likewise marked with a cross, the place where the third machine was operating (Tr. p. 151).

"I was not in the mine at the time of the accident, but that was in the stope the day before, and also the next day at about ten or eleven o'clock in the forenoon, and that I observed the rock or ore or waste which had fallen down."

The witness marked on the map "Exhibit A", the letters "X Cave" at the point where the rock fell (Tr. p. 152).

"The circular marks on the map near the place marked 'X Cave' represents the pillars left in the mine for the purpose of supporting the roof, varying in size from ten to twelve feet in diameter, and that the distance between the foot and the hanging-wall, at or about this point, was about twelve feet. That this distance would vary in the mine from eight to fifteen feet; seldom more than fifteen feet, and seldom less than eight feet, and the distance is not absolutely the same."

(Tr. p. 152.)

That there was no point in this level where the cave occurred where the distance between walls exceeded fifteen feet.

"Q. Was there any point from the foot to the hanging-wall that was fifty or sixty feet?

A. No, sir.

Q. Had you observed any danger in that point it fell, at any time previous to this?

A. No, sir."

(Tr. p. 153.)

"I was at the point of the accident the day before, in the forenoon.

Q. Had there been any caves immediately preceding the 9th of December, 1911?

A. No, sir.

From the hanging-wall on the 8th of December, 1911, there was no schist falling at the point where these people were at work on the 9th.

Q. When you were in there on the 8th of December, 1911, what, if anything, did you observe that indicated any possibility of caving at the point where the cave took place on the 9th of December?

A. No, there was no indication.

Q. On the 8th of December, 1911, when you were in there, was there anything which came to your knowledge that indicated the possibility of caving at the point where this accident occurred?

A. Nothing.

Q. How long were you in there on the 8th, through this fourth level?

A. Oh, about an hour.

Q. Was any complaint made to you?

A. No. sir."

(Tr. p. 156.)

"No request was ever made to me by plaintiff for safer conditions in the mine than had existed at the time the accident occurred, nor by any other employee. Pillars were left to support the hanging-wall to prevent it from caving. *The point where the caving took place was close to pillars, I should say ten or twelve feet from the pillar. The longest distance from one pillar to another at the point where plaintiff was working on the 9th, is twenty-three feet by actual measurement.*"

(Tr. p. 157.)

"I gave no instructions for the making of the switch to that track; that was Mr. Roper's business. I was not with Mr. Roper in the mine on December 8th; he was busy at his work. I was with John Keith, the superintendent. He and I would usually go through together. I would always see Mr. Roper in the mine and talk with him. On the 8th I was at the place where every machine was in operation. It was my business to see if there was any change, or what the conditions were.

Q. *Did you make any examination of the hanging-wall of the stope on the 8th?*

A. *I always looked at the hanging-walls every time I would go in the mine.*"

(Tr. p. 161.)

"Q. *You would look at them?*

A. Always, yes, sir; and look at them carefully to see if I see anything that looks dangerous, and I would call Mr. Keith's attention to it."

(Tr. p. 162.)

"Q. On the 8th of December, how did you get up to the hanging-wall to examine it?

A. Oh, I didn't have to get up to it; you could look at it, throw your light on it and look at it.

Q. You didn't go to it at all?

A. No.

Q. *Did you use a sounding bar on it?*

A. *At times, in places.*

Q. *Did you on the 8th of December?*

A. *In several places, yes, sir.*

Q. On the particular place where this cave occurred?

A. No, sir, I didn't.

Q. The only way you examined it on that day was to hold your candle up, was it?

A. Yes, and look at it."

(Tr. p. 164.)

"I don't know of there ever having been any caves in that stope prior to December 9th. Occasionally there would be a slab of schist drop off the hanging-wall in the worked out portions."

(Tr. p. 166.)

"The pitch of the vein varied at different places; sometimes it would pitch fifteen degrees, sometimes ten degrees, and sometimes it would be about flat. It was never entirely flat—always had some pitch to it.

The pillar nearest to Cunningham and the one against which Porter was injured, is marked on the map Exhibit 'A' by the letters 'N P', and the nearest pillar from that is marked by the figures '23'. The diameter of the pillar 'N P' was at least twelve feet; pillar 23 was a long pillar; it was probably eight feet in diameter, and twelve or fifteen feet long."

(Tr. p. 168.)

"In this mine the ore is of that thickness we cannot take it all down with the piston machines; we have to follow the piston drills with a Waugh machine, and after the ore left on the hanging-wall is drilled, they are loaded and fired, and that drops the ore down from the hanging-wall."

(Tr. p. 169.)

"The ore in this mine is very hard, and it takes a special powder to break it down. Special holes have to be drilled so we can break it; it breaks very hard. *The ore left on the hanging-wall, after the ore below is removed with the piston machines, cannot be got down without the use of the Waugh machine and dynamite.*"

(Tr. pp. 170-171.)

George Roper, the foreman at the time of the accident, testified:

"I have been engaged in mining all my active life,—nearly forty years."

(Tr. pp. 171-172.)

"On December 9, 1911, I had full charge of the mine, hired and discharged men, and supplied anything that was needed at the mine.

It was the duty of the muckers in that mine to make a clean place, so that the miner or machine man would have a clean place to set up. At no time did the machine men ever carry or handle any muck in that mine."

(Tr. p. 174.)

"There were pillars left in that mine to support the hanging-wall. There was also stulls. A stull is a 6x6 or 8x8 timber, with a headboard

on top of it, and wedged into place so as to support the hanging-wall and to prevent any slab that might be loose up there from coming down.

Q. Now, who placed the stulls that were placed in the Keane Wonder Mine?

A. The muckers.

Q. The muckers?

A. Yes.

Q. Is there a single stull placed in that mine that was ever placed there by any machine man?

A. No, sir, not one.

Mr. Perez was about the best mucker I had, and as a rule I had him do some of the timbering, and Matt Dropulich was another one,—those two gentlemen sitting in the back of the court-room—they were the men who put in the stulls."

(Tr. pp. 175-176.)

The witness identified Map Exhibit "A" as a correct representation of the underground workings of this level on December 9, 1911, and indicated on the map the place where the cave occurred, being the same point indicated by Mr. Wilson (Tr. pp. 176-177).

"*There were eight or nine stulls placed in that level right alongside of the track over which Cunningham and Perez operated their cars on December 9th.* Perez put in most of these stulls. There was lagging on the inside up to about five feet, as I intended to make a fill at this point to support the hanging-wall, so as to enable me to draw these pillars later on."

(Tr. p. 178.)

"Q. What was the space between the pillar marked 'N P' and the stulls?

A. Well, not to exceed five feet and a half. This space was used for the car-track.

Q. *Were there any other stulls in that mine other than those you have just enumerated?*

A. *Oh, yes, there is stulls all over. Where the quartz is hanging we don't need any.*

Q. State, if you know, the distance between the foot-wall and the hanging-wall at the place where plaintiff is alleged to have been injured.

A. *Thirteen feet four inches.*"

(Tr. p. 179.)

"On the day that plaintiff was injured, I was in and out of the mine all day long. I was in the mine about fifteen minutes before the accident. About that time Porter's machine was not running, and I went over to see what was the matter with it. I found that it wanted some new rings, and I told him to take it off the bar and take it outside to the blacksmith shop, and I went outside with him and repaired it. Porter carried it out. I told him to go back and load his holes, as there was nothing else for him to do."

(Tr. pp. 180-181.)

"Q. Is there any reason that you know why Mr. Porter should be down between pillars marked 'N P' and '23' at or about the time that plaintiff was injured?

A. None that I know of.

Q. If he had obeyed your instructions, he would have been at a point marked "X Y", is that right?

A. Yes, sir.

Q. And at the time of the accident you had Mr. Porter's machine out in the blacksmith shop repairing it?

A. Yes, sir."

(Tr. p. 182.)

"The mine was equipped with tools and implements, the same as any mine; had long bars of steel to bar down the backs.

Q. Will you state to the jury what you mean by barring down the backs?

A. Well, if there is a slab, or anything left on the roof, and if we see a little, we try to get it down with those bars; and if we can't get it down and think it is dangerous, as a rule we put a stull in it; but we always pull them down if possible.

Q. Now, who pulls them down?

A. Well, the muckers, of course."

(Tr. p. 183.)

"I was through this mine six or seven times at least daily. It was my main duty to see that the mine was kept safe—watch the roof, and see that the men did their work.

Q. And did you fulfill your duties?

A. To the best of my ability.

I did not at any time while in the employ of the Keane Wonder Mining Company, and particularly on the 9th day of December, 1911, see anything in the nature of the hanging-wall, or any ore on the hanging-wall, that would indicate to me in any shape, manner or form that there was any likelihood of the ore falling, with the possibility of injuring any employee in the mine.

I know the general character of the ore in this mine. It is known as bull quartz. It is very hard, and in about the middle, a little up above the middle, there is a seam that carries a small part of galena, and that has caused a cleavage; up to that seam we take it out with the piston drills, and then afterwards, why we take down what is known as the backs—that is the quartz that is left—with the Waugh drill. The lower part of the ore body is taken out by piston drills, by putting in the holes,

loading them, and breaking away the ore below the cleavage. The ore above the cleavage is left on the hanging-wall."

(Tr. pp. 184-185.)

"After the lower portion of the ore is removed, the upper body of the ore is removed by using Waugh drills. We drill in that ore; the holes we drill are designated as "uppers".

Q. *Why is it necessary to drill holes in ore on the hanging-wall—why does it not fall down naturally?*

A. *You do pretty well to shoot it down; it takes a good many holes; you can't put those holes above eighteen inches apart; the quartz is very tough; even after you do break it and shoot it, sometimes it is almost impossible to bar some of it down; it holds together, you know;* it is big, bulky stuff, therefore it is very tough—very tough to break. We have broken down the upper portion, that is, the portion on the hanging-wall, with the bar after it has been shot; not before."

(Tr. p. 185.)

"Q. Can you state to the jury what area, if any, or what extent you have removed the lower portion of the ore below the cleavage or seam, allowing the ore on the hanging-wall to remain?

A. Well, after this accident. I shot a place out there larger than this room, without even a pillar at all in it, and left the ore all hanging, and then I drilled a series of holes all the way round and shot it all down, a little over fifteen hundred tons at one time. This was ore that was left on the hanging-wall, and we took it down with the Waugh drill.

Q. Before that was taken down, of course the ore beneath had been removed?

A. All been removed.

Q. *And the miners and muckers were at work under the hanging ore all the time that the lower body of ore was being removed?*

A. *All the time. The ore removed by the piston machines varied from six to seven feet.*"

(Tr. pp. 185-186.)

"The average size of pillars left to support the roof, for the protection of the employees, would average about ten feet in diameter. In the immediate vicinity where plaintiff was injured, I think there is five or six pillars. There were two pillars right there, and they are there now."

(Tr. p. 187.)

"The general length of the timbers provided by the Company for use as stulls was about twelve feet. The longest stull in the mine is in the old pickey-pokey, fifteen feet ten inches."

(Tr. p. 188.)

"After the accident I went into the mine about seven o'clock. I saw the cave and the results of it. Where the rock broke off right next to a pillar, it was thirty-eight inches thick, and from there it ran out to a taper point, about fifteen feet out. At the present time, from the foot-wall right to the top where it fell down, is thirteen feet four inches. I measured it."

(Tr. pp. 189-190.)

"I told Cunningham and Perez where to work. They were supposed to be working at a point I presume sixty or sixty-five feet from the place where the cave occurred. *I saw the car used by them when I went back that evening.*

I examined the car as soon as I went into the mine. It was about sixty-five feet from the cave. The car was in the same condition as it always was. It was about one-third full of quartz. It was in good running condition and was not damaged."

(Tr. pp. 192-193.)

"*On the day of the accident I went right underneath the place where the cave occurred at least six times.* I didn't see anything that indicated to me in any way that there was any danger from a cave of the hanging-wall."

(Tr. p. 193.)

"About two days before Mr. Perez and me tried to bar down the ore left on the hanging-wall with two long bars, but we could not budge it.

Q. And why did you cease in your attempts to take it down?

A. Well, we came to the conclusion that there was only one way to ever bring it down, and that would be to drill it and blast it down.

Q. At that time when you ceased your labors, state whether or not you considered it safe or unsafe in the position in which it remained?

A. We considered it safe."

(Tr. pp. 194-195.)

"Q. What was the method adopted, the usual and customary method in the Keane Wonder Mine for ascertaining whether or not any ore on the hanging-wall was safe or unsafe?

A. Well, if we had any idea—we were all of us looking at it all the time—and if we had any idea anything was unsafe, *I would take and get a pick and sound it to see if it was drummy or not, and if it was, and we could find a crack there in it any where, we would try to pull it*

down; otherwise we would have to take and put a stull under it for safe keeping.

Q. When would you put a stull, under what circumstances would you put a stull under the portion?

A. Well, it would have to be a little away from a pillar, because if it was drummy right over a joining in a pillar, you know, a pillar was just the same as a stull, it would hold it."

(Tr. p. 195.)

"The point where the accident occurred, the ore below had been removed at least two months before the rock fell."

(Tr. p. 197.)

"The reason why we left this ore projecting out further from another portion of the face of the ore was because it helps hold the roof.

In my judgment, not to exceed five to seven tons of ore fell at the point designated as the cave. There was a little quartz mixed in it, but it was chiefly schist."

(Tr. p. 199.)

"I saw Cunningham and Perez working in the mine on the afternoon of December 9th. They were working at the point which I have indicated on the map by the word "car", which is sixty-five feet from the cave. *No mining had been done in and about the place of the cave for at least two months."*

(Tr. pp. 200-201.)

"About fifteen or twenty minutes before the accident, Cunningham and Perez were shoveling ore into a car. They were working under a solid body of ore, and were mucking the ore which had been removed by the piston machines.

The upper part, ranging all the way from six to seven feet, was on the hanging-wall; it had not been shot down. This point was at or near the point indicated on the map and marked 'car'."

(Tr. pp. 203-204.)

"I had a conversation with Cunningham in reference to his employment with the Mining Company. He asked me to give him the next machine. I asked him if he could run one. He said he could run one as good as any man in the mine. Well then I says 'I will give you the next machine'."

(Tr. p. 204.)

"The distance between the foot-wall and hanging-wall, by actual measurement, is thirteen feet, four inches, and this measurement will hold good for an area of at least two acres around the place of the cave.

There was no necessity or reason that I know of, that Cunningham should be at the point where the cave took place. There was no necessity for doing anything there. He should have been at the place marked 'car', helping Mr. Perez to fill it."

(Tr. pp. 206-207.)

"The first thing I did on entering the mine after the cave was to go over and look at the exact places where the men got caught. I had the men that took them out show me the exact places where the men got caught. The men who showed me were Louis Guerra and Mr. Perez and others; there was half a dozen of them; they went with me. There were at least a dozen men there at the time looking at the place where the cave took place. There was a miner named Ed Williams there. He is the

man sitting in the court-room back there. *Mr. Perez and Mr. Guerra pointed out the places where Cunningham was injured. He was caught up against the pillar marked 'N P', and Porter was caught up against pillar marked '23'.*

It was the duty of the miners employed by the Mining Company to get their places cleaned out, and if there was any loose above them, their first duty was to look at it, and then get the machine up as quick as possible, and of course pick it down and make it safe for themselves. It was a man's duty to see that it was safe over his head; that is any miner's duty."

(Tr. pp. 208-209.)

"Cross-Examination.

I had four men working on night shift. They were muckers; no machine men."

(Tr. pp. 215-216.)

"The reason I had muckers mucking of a night was to do that work, and clean up—always had a clean place to set up. Of course, *when the machine man went, he would take and sound on the roof above him, and if there was any loose he would tear it down; and he would do that for his own protection;* and if there was any loose in the face, he would pick it down, but as a rule that was all done before he went there."

(Tr. p. 216.)

"Q. You say the machine man would sound to see if there were any loose slabs or anything?

A. Certainly.

Q. And if there was a slab that looked as if it was loose, and he sounded it, would that always sound drummy?

A. It would if it was loose. Anything less than five or six feet in thickness, *if loose, will sound drummy; if it is loose you can always tell.*"

(Tr. p. 217.)

"The row of stulls for the proposed false pillar *was within eighteen inches from the track.* Perez put in nearly every one of these stulls.

Q. Now, I understand you to say, in answer to a question of Mr. Jarman's, there never had been any caving in that level before?

A. Not in the level before, no, sir; not during the time that I was there.

Q. Well, that is what I refer to, to your knowledge.

A. Yes.

Q. And how long were you there before December 9, 1911?

A. Oh, possibly ten or eleven months.

Q. Do you know of any slabs having sloughed off without having been helped with human agency?

A. No.

Q. You were thoroughly familiar with everything that happened in that stope during that ten or eleven months, were you?

A. I was."

(Tr. pp. 220-221.)

"Q. In each and every instance when you shot the holes drilled by the Waugh drills in an ore body above the seam, and hanging upon the hanging-wall, did those shots in every instance during that ten or eleven months break clean all the ore from the hanging-wall?

A. Good Lord, no.

Q. As a matter of fact then, after the shooting of the holes drilled by the Waugh drills, there would be ore bodies remaining, unbroken, from the hanging-wall at times?

A. At times, yes.
Q. And those you got down by barring?
A. By barring, yes."
(Tr. p. 221.)

"Redirect Examination.

The rock that fell down struck the floor, and the large lumps rolled over and caught Cunningham—caught his leg, and pinned him up against the pillar.

Q. Do you know what the effect would have been if that lump of rock had struck a man who was directly underneath it?
A. Broke every bone in his body."

Edmund Grimani, a miner for twelve years, and at the present time foreman at the Keane Wonder Mine, testified as follows:

"I worked in the mine three years as a miner, operating a piston machine. I quit on November 14, 1911, and returned in March, 1912, being absent on a vacation. When I quit, pillar 'N P' was already cut, and there was a track between pillar 'N P' and the place marked '23', at which I was at work at the time. The last time I was in the mine at the place of the cave was on the 16th of the present month, the day before I left to come here as a witness. I don't know of my own knowledge where the place was; I only know what has been told me. That place is where the cross is marked, near the pillars 'N P' and '23' on the map Exhibit 'A'. The ore in that mine is pretty hard breaking ground; in fact, it was ground that you could not make no headway without a machine; pretty tough breaking ground; you had to have holes pretty close together, that is, about eighteen inches, from that

to two feet, in order to get a good show to break.

Q. Did you work on the ore above what you took out?

A. Not on the ore above, no, sir. *There was no specified distance how far we would continue working in the ore body with piston machines with the ore remaining overhead. Sometimes the Waugh machine would be twenty to fifty feet away. We were always working with the ore above our head.*

Q. Now, why didn't that ore fall down of its own weight?

A. Well, it was pretty solid ground, there was no show for it to fall down.

Q. Could you bar it down?

A. No, sir.

Q. How did the Keane Wonder Mining Company get that ore down?

A. By a Waugh machine, drilling holes in it, loading the holes and shooting it down."

(Tr. pp. 231-232.)

"When I first go on shift I hunt around and look overhead, in fact, I look all around to see how the ground is; then I get in and rig up my machine and drill for the rest of the shift. If there is anything on the hanging, or near about there, I pull it down. I am referring to the place I am working in. I do not go to any other place in that mine and pull down any stuff or bar it down. That is done by anyone working in the place. *Each man generally looks after himself, that is, as to the particular place.*"

(Tr. p. 234.)

"Any person who goes to a place to work in the mine, naturally would look around to see whether there was any dangerous ground, and pull it down.

Q. Who else besides the machine men were employed in that mine during the time you were employed there?

A. Muckers. They muck out the ore, build tracks, put in stulls. I have seen muckers putting up stulls in that mine. They got the stulls on the outside of the mine. Sometimes they were kept out by the blacksmith shop, and sometimes down below by the tramway, where they came up."

(Tr. p. 235.)

E. W. Williams, a miner for twelve or fourteen years, testified:

"I was in the employ of the Mining Company on December 9, 1911. I know Cunningham, and I know the place in the mine where the cave took place. I am familiar with Map 'A', and the place of the cave is indicated by the 'X' near pillars '23' and 'N P'.

I went into the mine the next morning after the caving about 7:30 a. m. Mr. Roper and several more men went with me. After we got into the mine he showed us first where the cave took place. I found that the mixture of the hanging-wall, there was a little ore in it, not much—had caved down and rolled over between these two pillars, on both the switch and the track. There was four or five tons, I should judge. There was one pillar on each side of the switch, and then there were stulls on the opposite side of the track, opposite the pillars, toward the chute. The pillars were close to ten or twelve feet through; might have been a little longer one way than the other."

(Tr. p. 238.)

"I saw two cars in the mine. They were quite a little ways away from the cave; I should

judge from thirty to fifty feet. I examined one of the cars, the one in the switch.

Q. Why did you examine that car?

A. Because all of them went up and looked into it, most of the fellows—Mr. Roper and the rest of them.

Q. What did you find from examination?

A. Well, it was one-third to a half full of ore."

(Tr. p. 239.)

"I am familiar with the character of the ore in the Keane Wonder Mine; it is a very hard, solid quartz, about as hard as you find anywhere.

Cross-Examination.

I was not in the mine on December 9, 1911. On the morning of the 10th I saw a schist and ore pile there from five to six feet long it looked like; maybe scattered a little further than that, some of it, where it had rolled; some of it eight or nine feet. I should judge it was three and a half or four feet wide, possibly eight or nine feet long. Some rocks there might have been twenty-four to thirty inches thick. The tracks were not clear at that time; they were not completely covered; some ore on it and some not. I could tell from the look of the track that it had never been mucked away from the track. At that time there was nobody at work there; it was just before going to work, just the time everybody was going on shift. I stayed there probably fifteen minutes."

(Tr. p. 240.)

"The Court. Mr. Williams, when you examined that pile of debris at the place where the accident is said to have occurred on the morning of the 10th, did you examine it with any care?

A. Yes, I did, because in a case like that anybody would naturally do it.

Q. Did you observe whether there was anything in there except schist and ore?

A. I didn't see anything there but that schist and ore.

Q. Did you see any tools there?

A. No, sir, I did not.

Q. No car there?

A. Not right at that spot, no, sir.

Q. If there had been any shovel there, would you have seen it?

A. I think I would if there had been any there. None of that pile of muck that had caved from the hanging-wall had been moved when I saw it, that I know of, and none was moved while I was there.

The COURT. It didn't appear, any of it, to have been moved, did it?

A. No, sir, it didn't appear any of it to have been moved. I am pretty certain of that."

(Tr. pp. 241-242.)

At this point, plaintiff in error (defendant in the Court below) rested its case.

Thereupon, defendant in error was recalled in rebuttal, and testified as follows:

"I have examined the map 'Exhibit A', and it does not represent exactly the condition and place of that track on the 9th day of December, 1911.

Q. Will you state what change could be made in the map where it is marked 'Switch', that part of the track, to make it represent the actual condition on the 9th of December, 1911?

A. Well, this main track should go up here (indicates).

Q. Should go up there?

A. And this is the switch marked off here, ain't it?

Q. Yes.

A. And them pillars, I don't understand them—that ain't the way it looked at that time."

(Tr. pp. 242-243.)

"During the time I worked in the Keane Wonder Mine I never put up or assisted in putting up a stull. I was never requested or instructed by Mr. Roper to put up a stull, nor was I ever informed by any person in authority that there were stulls in the mine or outside the mine that I was to use in case I saw a dangerous place in the roof.

Mr. MILLER. Plaintiff rests, if your Honor please."

(Tr. p. 244.)

Thereupon counsel for plaintiff in error renewed the motion previously made for a directed verdict on the grounds and for the reasons urged in the second and fourth paragraphs of the motion made upon the conclusion of the testimony of the plaintiff, which motion was overruled, and an exception allowed (Tr. pp. 244-245).

Thereupon the Court instructed the jury (Tr. pp. 245-260).

The foregoing is a full and fair resume of the evidence in the case; and while it may appear to this Court that there has been a needless repetition as to some matters, we have deemed it advisable to do so, and to set forth as much of the testimony as possible *in haec verba,* so that this Court will be

able to appreciate and understand the nature and character of the evidence upon which the jury awarded defendant in error the sum of twelve thousand five hundred dollars for injuries sustained by him by reason of the alleged negligence and carelessness of the Keane Wonder Mining Company, plaintiff in error.

II.

Assignments of Error.

The fourteen assignments of error may, for all practical purposes, be grouped into two divisions, —one raising the point of the insufficiency of the evidence to sustain the judgment, and the other raising the point as to the enforcement of a law of the State of California in the State of Nevada, which is radically and fundamentally different from the law of that state on the same subject.

The first group includes assignments of error 5, 6, 9, 10, 13, 14 and 15. Assignments 10 and 14 thereof are sufficiently typical to advise the Court of the point urged. They are as follows:

> "X. The Court erred in denying defendant's motion for a directed verdict at the conclusion of all the evidence in the case for the reason that there is no evidence that the alleged injuries to plaintiff were sustained by him within the State of California while engaged in the line of his duties or in the course of his employment, by reason of the want of ordinary or reasonable care of this defendant or of any

officer, agent or servant of this defendant, and that, in particular, there is no evidence:

a. Of any breach of a statutory duty;

b. Of any complaint by the plaintiff before said alleged accident that defendant's mine was unsafe or dangerous;

c. Of any knowledge on the part of defendant of a dangerous or unsafe condition of the mine or that the roof thereof was dangerous or was liable to fall;

d. Of any request by plaintiff or any other person that the roof of said mine be made safe;

e. Of any refusal or neglect by this defendant to make the roof of said mine safe after request made by plaintiff or any other person;

f. Or affirmative proof that even if defendant had made a more extended examination of the roof of said mine that the alleged defect might have been or would have been discovered by it;

g. Or affirmative proof that there was any loose rock or ore on the roof of said mine as alleged in said amended complaint;

h. Or affirmative proof of assurances by defendant to plaintiff as to the safety of the place where plaintiff was injured after objections thereto made by plaintiff to defendant;

i. Or affirmative proof that appliances used by defendant were insufficient or inadequate.

j. Or affirmative proof that any of defendant's employees were incompetent;

k. Or affirmative proof of any lack of supervision on the part of defendant;

l. Or affirmative proof that defendant failed to make proper tests to determine the safety of the roof of said mine;

m. Or affirmative proof that defendant did not do its full duty in making the said mine a safe place for plaintiff to work;

n. That injury to plaintiff resulted from any failure of defendant to warn him of any danger known to or which should have been known to this defendant;

o. Or affirmative proof that an extra pillar was needed or that any extra stulls or supports were needed at the place where the roof of the mine caved, or that defendant knew that any such were needed; nor is there any affirmative proof of any reason or cause which would or should have put defendant on notice that such pillars or stulls or supports were needed;

p. Or affirmative proof that had defendant placed the usual and customary stull or support at place where the roof of the mine caved that such stull or other support would have prevented the caving;

q. Or affirmative proof that any pillar in said mine was removed which should have been allowed to remain;

r. Or affirmative proof from any witness that any rock in said mine was loose and was known or should have been known to defendant prior to the time of the accident; and there is no evidence to show that defendant had any cause to know that any rock in said mine was loose and liable to fall, to the possible injury of any of its employees, nor is there any proof that this defendant had any reason from any cause so to believe.

XIV. That the said judgment so entered on the verdict of the said jury was contrary to and is against law because the undisputed evidence in the case conclusively establishes that the plaintiff was guilty of contributory negligence which resulted in his alleged injuries, and in this behalf that the undisputed facts in the case conclusively establish that the contributory negligence on the part of plaintiff was not slight and that of the employer was gross

in comparison. On the contrary, if there was any negligence established in the case on the part of plaintiff and defendant, that such negligence on the part of each was ordinary negligence and was not slight and gross by comparison but was equal."

The second group includes assignments of error 1, 2, 3, 4, 7, 8, 11, 12 and 14; and assignment 8 thereof is likewise typical of this point. It is as follows:

"VIII. The Court erred in denying defendant's motion for a directed verdict in its favor at the conclusion of all the evidence in the case for the reason that under the law of comity, the above entitled Court will not and should not entertain jurisdiction of this action of damages for alleged injury to plaintiff while in the employ of defendant in the State of California, in that the said statute of the said State of California, under which this action was and is prosecuted, to wit, Roseberry Employers' Liability Act, Cal. Stat. 1911, is contrary to the law and public policy of the State of Nevada upon the same subject."

Brief of the Argument.

I.

The argument for plaintiff in error will follow the foregoing grouping of the assignments of error.

A. Excepting as to the alleged element of negligence referred to in the last paragraph of the opinion of the learnéd Judge of the Court below, denying the motion for a nonsuit or directed verdict, we are of the opinion that no better argument

can be presented in behalf of plaintiff in error on the insufficiency of the evidence to sustain the judgment than the opinion referred to. We submit same to this Court as reasoning unanswerable, that the alleged elements of negligence referred to in the opinion and relied upon by defendant in error are wholly unsupported by the evidence introduced in his behalf, and therefore legally insufficient to sustain a judgment in his favor.

The opinion referred to is fully set out at page 30 of this brief, and is to be found in the transcript, pages 137-140.

In actions of this character there are certain elementary propositions of law which must be applied in reaching a correct conclusion of the problem presented. We have no doubt but that the Court is fully advised as to the law, but as a matter of convenience, we quote the following as being applicable to this case, and particularly to the point under discussion, as the law, not only of the State of California, but of the State of Nevada as well.

> "In an action to recover damages for injuries sustained by an employe, the burden is on the plaintiff to affirmatively prove his employer's negligence."
>
> 26 Cyc. 1102;
>
> Campbell v. Southern Pacific Co., 21 Cal. App. 175, 131 Pac. Rep. 80;
>
> Patton v. Texas & Pacific Ry. Co., 179 U. S. 658; 45 L. Ed. 361.

> "The burden is upon the injured servant to show that the machinery or appliances were

so defective or inadequate as to make the use of them by the employee negligent and culpable."

Lyman v. Mining Co., 140 Cal. 700.

"In an action for personal injuries it is essential that the servant should prove by a preponderance of the evidence, not only that the master was negligent, but also that his negligence was the cause of the injuries, and this obligation is not discharged by merely showing the existence of a defect or the happening of the accident or injury."

26 Cyc. 1415-16-17.

"Mere proof of the existence of a defect or the happening of the accident or injury is not, without more, sufficient to establish the master's negligence."

26 Cyc. 1446;

Madden v. Occidental Steamship Co., 86 Cal. 445; 25 Pac. Rep. 5.

"That evidence is deemed satisfactory which ordinarily produces *moral certainty or conviction in an unprejudiced mind.* Such evidence alone will justify a verdict. *Evidence less than this is denominated slight evidence.*"

Cal. C. C. P., Sec. 1835.

The rule in this regard is the same upon a statutory liability.

Labatt, Vol. 5, Sec. 1644.

"In an action by a servant against his master for personal injuries there is a *prima facie* presumption that the master was free from negligence."

26 Cyc. 1410.

Thompson on Negligence, Vol. 4, pp. 380-382.

"Where the evidence leaves the cause of an injury unproved, it cannot be attributed to the defendant's negligence."

26 Cyc. 1410.

"No presumption of negligence on the part of the master arises from the mere existence of a defect or the happening of the accident through which the servant was injured."

26 Cyc. 1411;

Thompson v. California Construction Co., 148 Cal. 35; 82 Pac. Rep. 367;

Brymer v. Southern Pacific Co., 90 Cal. 496; 27 Pac. Rep. 371.

"In the absence of evidence to the contrary the law presumes that the master has performed his duty with reference to furnishing his servants with reasonably safe places for work, and that he has no notice of any defects therein."

26 Cyc. 1412;

Brymer v. Southern Pacific Co., 90 Cal. 496.

"In the absence of evidence to the contrary it will be presumed that the methods of work adopted by a master are proper and sufficient."

26 Cyc. 1413.

"*In a servant's personal injury action where the circumstances show nothing as to the real cause of the injury, there is a failure of proof.*"

26 Cyc. 1442.

"The master is not an insurer of his servant's safety, but is only required to exercise such ordinary care and diligence as would be rea-

sonable in view of the work to be performed, and the dangers incident to the employment."

26 Cyc. 1102;

Brymer v. Southern Pacific Co., ante;

Thompson v. California Construction Co., ante.

"It is a well-settled rule that the mere failure to inspect is not negligence where an inspection would only show what was already known to the servant and all others."

26 Cyc. 1136-37.

"Actual or constructive knowledge by a master of the defective condition of his places for work does not make him liable for injuries arising therefrom, unless he has had a reasonable opportunity, after acquiring such knowledge, to remedy the defect."

26 Cyc. 1141.

"An employee of mature years is presumed to be acquainted with the dangers incident to the service, and no duty rests upon the master to warn and instruct him as to the possible or probable dangers of the employment, where he is mature, intelligent, and experienced in the work, and the master has no notice or reason to believe that he is not fully competent and acquainted with such dangers."

26 Cyc. 1172-73.

"It is not negligence for a master to set his servant to a piece of work where such servant is of sufficient age and intelligence to appreciate the risk which is both patent and incident to the particular work."

26 Cyc. 1165;

Brett v. S. H. Frank Co., 153 Cal. 267.

"That one who is working in a place where he is exposed to danger must exercise his faculties for his own protection, and if he fail to do so he is not entitled to damages for personal injuries received."

Kenna v. Central Pacific Ry., 101 Cal. 26.

"Having eyes he must use them, and being informed, he must act upon the information."

Towne v. United Electric Co., 146 Cal. 770.

Applying the foregoing principles of law to the evidence, no other conclusion is possible than that reached by the learned Judge of the Court below, and in closing this branch of the argument, we submit the opinion of the late Mr. Justice Brewer of the United States Supreme Court, in the case of Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, as in all respects an authority applicable to, and governing and controlling, the case at bar, and sustaining the contention made by plaintiff in error as to the insufficiency of the evidence to sustain the judgment.

In that case Mr. Justice Brewer said:

"It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact; and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them.

Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator

of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence, stands charged with full responsibility.

* * * * * *

The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence. It is not sufficient for the employe to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. *If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.* While the employer is bound to provide a safe place and safe machinery in which, and with which, the employe is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employe, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe. * * * He is bound to take reasonable care and make reasonable effort, and the greater the risk which attends the work to be done, and the machin-

ery to be used, the more imperative is the obligation resting upon him. * * *

No one can say from the testimony how it happened that the step became loose. Under those circumstances it would be trifling with the rights of parties for a jury to find that the plaintiff had proved that the injury was caused by the negligence of the employer.

The judgment of the lower court directing a verdict for the defendant, affirmed."

B. The reasoning of the learned Judge in denying a directed verdict is erroneous *because negligence is assumed and not proved,* and is predicated solely upon the evidence that a body of ore was left on the hanging-wall, and that it fell and injured the defendant in error.

The decision of the lower court can only be upheld by the application of the doctrine *res ipsa loquitur* which is contrary to the established law of the State of California.

For the Court's convenience we again quote that part of the opinion referred to:

"It seems to me the only testimony conveying a definite idea that defendant was negligent, was the falling of the ore body itself. * * * Now, here is a large chamber; at the point where the accident occurred the hanging-wall was twenty-five feet above the foot-wall, and an enormous body, sixty tons of ore, were left on the hanging-wall. It seems to me that in itself, was negligence; at least it is a fact tending to show negligence. On the existence of that fact I hold there is testimony here showing negligence. The motion is denied."

(Tr. p. 140.)

There is no pretense of evidence that the Mining Company violated any statutory duty in allowing ore to remain on the hanging-wall, nor of any complaint by defendant in error, or any other person, that by reason thereof the mine was unsafe or dangerous; nor is there any evidence of knowledge on the part of the Mining Company of the alleged dangerous or unsafe condition of the mine, or that the roof thereof was dangerous, or that it was liable to fall; there is no evidence of any request by defendant in error or any other employe that the roof of the mine be made safe, nor is there any evidence of any refusal or neglect by the Mining Company to make the roof of the mine safe after request by defendant in error or any other person, or to take down the ore which fell, or to place a stull under it so as to protect the roof at that point; nor is there any evidence in the record that even if the Mining Company had made a more extended examination of the roof of the mine that it might have, or could have discovered that the ore which fell was loose, or that it was likely to fall and injure its employes, *nor is there any evidence whatever in the record that there was any loose rock or ore on the roof or hanging-wall of said mine, as alleged in the amended complaint. On the contrary, the positive testimony is to the effect that the rock which fell was solid and firmly attached to the hanging-wall, and that so far as the knowledge of those in charge of the mine was concerned, including defendant in error and his witnesses, the only way to take down the ore*

was to drill holes and shoot it down by dynamite; there is no evidence that the Mining Company ever gave any of its employes any assurances as to the safety of the place where defendant in error was injured, after objections thereto made by defendant in error, or any other person; there is no evidence that the appliances used by the Mining Company were insufficient or inadequate, or that any of its employes were incompetent; nor is there any evidence of any lack of supervision by the Mining Company. *On the contrary, the evidence of the witnesses of defendant in error affirmatively establishes daily supervision and inspection by the employes of the Mining Company;* there is no evidence whatever that the Mining Company failed to make proper tests to determine the safety of the roof of its mine at the point where Cunningham was injured; there is no evidence whatever that the injury to Cunningham resulted from any failure of the Mining Company to warn him of any danger known to, or which should have been known to the company; nor is there any evidence whatever, directly or indirectly, to the effect that an extra pillar or stull was needed at the place where the roof of the mine caved, or that the Mining Company knew that any such were needed; nor is there any evidence of any fact which would, or should have put the company on notice that pillars, or stulls, or supports, were needed at that point in order to prevent a caving, and a possible consequent injury to its employes; nor is there any evidence that had the Mining Company placed

the usual and customary stull or support at the place where the roof of the mine caved, that such stull or other support would have prevented the caving; nor is there any evidence that the Mining Company failed to leave the requisite number of pillars necessary to properly support the roof of the mine, and there is no evidence that any such pillar was removed by the company which should have been allowed to remain, and by reason of which the cave resulted which caused the injury. And finally, there is no evidence whatever that any rock or ore in said mine was loose, and was known to the company, nor of any facts indicating, directly or indirectly, that the company should have known that same was loose prior to the time of the accident, nor is there any evidence that the Mining Company had any reason, from any cause, so to believe.

In the absence of some such evidence, the mere fact that the ore fell from the hanging-wall and injured defendant in error is proof of an accident, nothing more, and nothing less, for which no legal liability attaches to the master.

The fact that there is an absence of evidence in the particulars enumerated compels the Court, as a matter of law, to decide in favor of the Mining Company, in accordance with the presumptions hereinbefore referred to. Therefore, in the case at bar, the Court is bound to say, from the evidence introduced respecting the falling of the ore, that no question of negligence therefor can be imputed to

the Mining Company, and the presumption that the master has performed his duty with reference to furnishing its servants a reasonably safe place to work, and that the master had no notice of any defect or of any condition in any way indicating that the ore or rock was liable to fall, must obtain. If the matter ended here, there could be no question but that the evidence is wholly insufficient to sustain the judgment.

The learned Judge of the Court below was impressed with three additional facts, to wit:

(1) A large chamber.

(2) Hanging-wall twenty-five feet.

(3) Enormous body left on the hanging-wall, to wit: sixty tons.

These three facts, coupled with the fact that the ore actually fell, and injured Cunningham, were held sufficient proof of negligence to warrant the case being submitted to the jury, and consequently, sufficient to uphold the verdict in favor of defendant in error.

We propose to discuss the facts in the order named.

(1) A LARGE CHAMBER.

It is difficult to perceive how this fact, standing by itself, in the absence of affirmative proof that the hanging-wall or roof was not supported by the requisite number of pillars or stulls, is or can be

construed as constituting any element of negligence on the part of the Mining Company. The size of the chamber or stope is of no consequence, provided that it is supported by pillars, or otherwise, in such manner as the judgment of reasonable men, operating under like circumstances and like conditions, would dictate. If the fact that a cave occurred in a large chamber was an element of negligence, *non constat* it would be a complete defense in a similar action if the cave occurred in a small chamber or stope. The size of a chamber or stope is of no consequence whatever. For it is a well-known fact that no two mines are in all respects similar concerning timbering. What would be adequate timbering in one mine would be wholly inadequate in another. What is, or is not, adequate timbering in any given mine, depends wholly upon the nature and character of the formation of the particular mine.

The care which the law charges the Mining Company in respect to the operation of its mine, is in a measure commensurate with the requirements of the mine itself, which are easily proved.

The evidence in this case affirmatively establishes that very little, if any, timbering was required in this mine. There is no evidence of any caves prior to December 9, 1911. As a matter of fact, the uncontradicted evidence establishes the fact that a great ore body had been taken out prior to that time without injury to any employe, and there is no evidence that the Mining Company conducted its min-

ing operations on December 9, 1911, in respect to timbering, in any manner different from prior operations.

It is manifest, therefore, that so far as the evidence in this case is concerned, the fact that defendant in error was injured in what the learned Judge was pleased to term "a large chamber", or a large stope, by itself, is of no consequence whatever as establishing negligence on the part of the Mining Company.

The answer to this proposition is solved by the testimony of defendant in error, when he testified as follows:

> "The pillars are part of the ore left to protect the mine. It stands there a solid body of ore to hold up the roof of the stope.
>
> Q. And where there is one left there is no use for any timbers, is there?
>
> A. Oh, yes; you have got to timber it.
>
> Q. Always, do you always have to timber it?
>
> A. *It all depends on how wide them pillars is.*
>
> Q. *Precisely; and the width of the stope.*
>
> A. *And the width of the stope.*"

(2) HANGING-WALL TWENTY-FIVE FEET.

In disposing of the motion in the Court below the learned Judge assumed as a fact that the distance from the foot-wall to the hanging-wall was twenty-five feet, and no doubt this assumption was based upon the positive testimony of Cunningham, on his direct examination, when he testified that

> "The thickness of the ore at the place where I was injured, from the foot-wall to the hanging-wall, was close to twenty-five feet."

On cross-examination the witness testified that *he had never measured the distance, nor seen it measured, and that he was just guessing.* He also testified that the *chute timbers ran clean up to the hanging-wall, and that they were about ten feet* (Tr p. 86).

Matt Dropulich, a witness for defendant in error, testified that the space between the floor of the stope and the roof, is from fifteen to twenty feet (Tr. p. 93).

A. Perez, also a witness for defendant in error, testified:

> "I guess the distance between the foot-wall and the hanging-wall at the place where Mr. Cunningham was injured was may be from fifteen to twenty feet."
>
> (Tr. p. 117.)

Frank Porter, also a witness for defendant in error, inferentially stated the distance to be from ten, or fifteen or twenty feet.

(Tr. p. 121.)

Inasmuch as it clearly appears from the evidence that the testimony of the witnesses in reference to the distance between the walls was a mere matter of estimate or guess, and there being no evidence to the effect that defendant in error was ever denied permission to make examination of the stope and to obtain the exact measurements, the Court below can only say, as a matter of law, that the distance between the walls is fifteen feet, and no more. To hold otherwise would make justice a farce, and

would encourage perjury. There is no evidence in the case that the mine, at the point of the injury, has been destroyed, or that it has in any way been changed. On the contrary, the testimony of the witnesses for plaintiff in error was to the effect that the mine was in identically the same condition at the point of the accident as it was on December 9, 1911.

The fact, therefore, assumed by the Court in determining this motion being one capable of exact measurement, and over which there should not be any dispute, when it becomes a material fact before a court, is obviously unwarranted, even from the testimony of the witnesses of the defendant in error.

While it is true that the exact distance between the walls at the point referred to was not in evidence as a part of defendant in error's case, yet it was proved by the testimony of George Roper, the foreman in the mine at the time of the accident. *He testified that the exact distance was thirteen feet, four inches, and that he measured it.* His testimony in this regard was not contradicted, and inasmuch as our motion for a directed verdict was renewed at the conclusion of all the evidence in the case, for the purpose of disposing of this motion, this Court should take as a fact that the ore which fell was attached to the hanging-wall thirteen feet four inches from the foot-wall. Positive testimony of a physical condition existing at the time of trial (and now existing), must control in any court. The

actual distance between the walls can readily be harmonized with the testimony of the witnesses referred to, in estimating same to be about fifteen feet, but it is inconceivable that an unprejudiced and unbiased witness can be so far mistaken in estimating the height of a place in which he had been at work for several days, as to testify that the distance was twenty-five feet, when the actual distance is but thirteen feet four inches. If this is any standard of the accuracy of the testimony in behalf of defendant in error, it is obvious that his case is far weaker than that which appears on the face of the record itself.

Now that we have the true distance between walls at the point of the accident, we respectfully submit that the distance itself, in the absence of testimony as to the nature and character of the rock or ore remaining on the hanging-wall, as being likely to fall or moved by the elements, or any other cause, and which plaintiff in error knew, or by the exercise of reasonable care should have known, is of itself no evidence of negligence. It is obvious that the danger from ore remaining on the hanging-wall is not the distance from the foot-wall to the ore itself, but the nature and character of the ore and the hanging-wall. If there were evidence in this case that the hanging-wall was thin, and that it would not support any great weight attached to it, or that the nature and character of the ore was such that the effect of the air upon same would be to soften or slack same, causing it to disintegrate and

break away from the hanging-wall, then it is apparent that negligence might properly be attributed to the Mining Company, as such conditions should have been known to it, and necessary precautions taken to prevent the falling of the ore.

No such conditions are proven to exist in the Keane Wonder Mine. On the contrary, all the evidence in the case, including the witnesses of defendant in error, is to the effect that the ore is an extremely hard quartz, very difficult to break, and that the only way it can be removed from the hanging-wall is by the use of dynamite exploded in holes drilled from eighteen inches to twenty-four inches apart. Not only this, but it is the undisputed evidence in this case that every miner in the Keane Wonder Mine engaged in extracting the ore from the large stope shown in Exhibit "A", worked with his piston machine under ore attached to the hanging-wall,—not only the miners, but the muckers as well. All this, and no accident of a like nature prior to December 9, 1911, nor of any fact or circumstance coming to the knowledge of the Mining Company which would place it upon inquiry as to a probable danger from ore remaining on the hanging-wall. Ordinary prudence and intelligence does not compel a mine owner to guard against every possible accident or danger. It is quite sufficient that those dangers be guarded against which, considering the nature of the particular mine, are obvious or likely.

We respectfully submit that the distance between the walls, whether thirteen feet four inches, or twenty-five feet, is, in the absence of connecting evidence, wholly immaterial, and entirely insufficient to establish negligence on the part of the Mining Company.

(3) ENORMOUS BODY LEFT ON HANGING-WALL, TO WIT: SIXTY TONS.

Defendant in error testified that in his judgment about seventy tons of rock and ore fell; he did not know the number of pounds or cubic feet in a ton, and that in making his estimate he was just guessing.

Louis Guerra testified that as near as he could tell or estimate, about sixty cars of rock fell (a car holding three-fourths of a ton). The evidence in behalf of defendant in error in this regard being strictly a matter of estimate, leaves the matter in doubt whether it was forty-five or seventy tons which fell. However, conceding, for the purpose of our argument, the middle ground assumed by the learned Judge of the Court below, that plaintiff in error allowed sixty tons of ore and rock to remain on the hanging-wall at the point of the cave,—how could the lower Court, and how can this Court say, as a matter of fact, that sixty tons of ore left on the hanging-wall in the Keane Wonder Mine, was, in and of itself, such a dangerous condition that the Mining Company necessarily must be charged with knowledge of possible danger therefrom, and

that, therefore, it must take such precautions as will in any event prevent same from falling?

The absurdity of such a position is demonstrated by the uncontradicted evidence in this case that in the Keane Wonder Mine the character of the ore was, and is, such that it cannot be broken except by the use of dynamite; that during the entire operations of the mine, extending over a period of four years prior to the time of the accident, the company had to, and did allow enormous quantities of ore, aggregating many hundreds of tons, to remain on the hanging-wall, and without props or supports, and without danger to any one; that this ore did not, and would not fall by reason of its own weight, and that it would only come down after same had been drilled and shot down with dynamite. And, finally, it is an uncontroverted fact that at one time Mr. Roper shot down fifteen hundred tons of ore which had for some time remained on the hanging-wall without pillar, timber or stull supporting it. It is, we submit, quite evident that the degree of care which the law imposes upon a mine owner in operating its mine, must be measured in some degree, at least, by the nature and character of the mine itself, for it would be foolish to say to the Keane Wonder Mining Company that "You must provide your mine and support your hanging-walls with the same degree of care and skill, and with the same number of stulls, as the Wildman Mine, in the State of California", which, for the Court's information, we state, on account of the nature and

character of the ground, requires so many stulls that the underground workings have more the appearance of a forest than that of a mine.

While we realize that the testimony of the witnesses for plaintiff in error as to the amount or quantity of rock or ore which fell cannot, in a consideration of this point, be considered, yet we call the Court's attention to same in order to direct the Court's attention to the absurdity of the testimony of the witnesses for defendant in error on this point.

Mr. Roper testified that not more than five or seven tons fell; Mr. Wilson, who saw the debris after a part had been removed,—two or three tons, and Mr. Williams, that in his opinion about five or six tons.

It is a well-known fact that in round numbers, about thirteen cubic feet of ore are necessary to make a ton, and that if the figures assumed by the Court are correct, the solid ore falling from the hanging-wall would, when in place, occupy a space of seven hundred and fifty cubic feet, and would constitute a solid body of ore or rock at least ten feet wide, twelve feet long, and six feet thick. This space refers, of course, to solid formation. After ore is broken and taken from its place, it will require at least eighteen cubic feet to care for a ton.

The testimony of Mr. Perez, a witness for defendant in error, was to the effect that when he reached Cunningham he found him wedged in rocks piled

up to his knee, and there is not the testimony of a single witness in the case that the height of this rock, after falling, exceeded the height of Cunningham's knee.

It is easy to gather from the foregoing the flimsy character of the evidence upon which the Court relied, and upon which the jury based its award of $12,500. We confess that we are utterly unable to understand how any intelligent jury could base its verdict upon such evidence unless it be that plaintiff in error was a stranger in a strange land.

In concluding this branch of our argument, we especially direct the attention of Court and counsel that there is not a scintilla of evidence in the record to the effect that merely allowing sixty tons of ore or rock to remain on the hanging-wall of the Keane Wonder Mine was a dangerous thing to do. Nor is there any evidence in the case that plaintiff in error did not, so far as it was advised, leave the requisite number of pillars in order to protect the roof of that mine; nor is there any evidence in the record that plaintiff in error had any reason to believe that at the point of the cave the pillars were insufficient for the protection of the roof, or that a stull was necessary.

As we said in the beginning, the theory of the ruling of the learned Judge in the Court below is based, and can only be sustained, upon the application of the doctrine of *res ipsa loquitur.*

The following authorities are conclusive on this question in this case:

Patton v. Texas & Pacific Railway Co., 179 U. S. 658; 45 L. ed. 361;

Mountain Copper Co. v. Van Buren, 123 Fed. 61;

Sappenfield v. R. R. Co., 91 Cal. 48; 27 Pac. Rep. 590;

Brymer v. Southern Pacific Co., 90 Cal. 496; 6 L. R. A. (N. S.) note p. 337; 344.

In determining the liability of a mine owner on account of negligence the Court applies the same rules of law as in other cases. There is no law peculiarly applicable to mine owners.

The liability is best expressed in Thompson on Negligence, as follows:

> *"Mine owners are bound to exercise reasonable care and skill and to adopt all reasonable means and precautions to lessen the danger to their employes from the falling of portions of the roof of the mine; but they are not insurers, in favor of their miners, that the roof of their mine will be at all times so propped that it absolutely will not fall, either under the principles of the common law, or, it may be assumed, under the statute law."*
>
> Thompson on Negligence, Vol. 4, p. 370, Sec. 4191.

> "In order to charge the owner or operator of a coal mine with negligence because of the falling of loose rock or earth from the roof of the mine, he must have had previous knowledge of a defective or dangerous condition of the

roof, or, by the exercise of ordinary care and caution, have been able to discover the defective condition."

Cherokee Coal Co. v. Britton, 45 Pac. 100;

Con. Coal Co. v. Scheller, 42 Ill. App. 619;

S. W. V. Co. v. Andrew, 86 Va. 270; 9 S. E. 1015;

Bird v. Utica Mine, 84 Pac. 256;

Grant v. Varney, 40 Pac. 771;

Western Investment Co. v. McFarland, 166 Fed. 76.

"The master's liability for injuries to a servant arising from defects in the place for work, * * * is dependent upon his knowledge actual or constructive, of such defects."

26 Cyc. 1142.

"A master is not liable for injuries resulting to a servant by reason of latent defects of which he was ignorant, and which could not be discovered in the exercise of reasonable care and diligence."

26 Cyc. 1145, note 92.

"In order to hold a master liable for injuries to his servant alleged to have been caused by the unsafe methods of work adopted by him, it must be shown that he had, or ought to have had, knowledge of the danger."

26 Cyc. 1156, note 35.

Applying the foregoing principles to the facts of the case at bar, it is evident, even to a layman, that the judgment against plaintiff in error is unsupported by any evidence. There is no evidence in the record that the Mining Company had

previous knowledge of a defective or dangerous condition of the roof, nor is there any evidence, direct or indirect, that by the exercise of ordinary care and caution the Mining Company would have been able to discover the defective condition (not now known) which resulted or caused the rock or ore to fall from the hanging-wall.

We submit, therefore, that the judgment of the Court below denying our motion for a directed verdict, be reversed, with instructions to the Court below to enter judgment in favor of the Mining Company.

II.

IT WAS ERROR FOR THE COURT BELOW TO ENFORCE IN THE STATE OF NEVADA A LAW OF THE STATE OF CALIFORNIA RADICALLY AND FUNDAMENTALLY DIFFERENT FROM THE LAW OF THE FORUM ON THE SAME SUBJECT.

The sum and substance of the point urged in this branch of our argument is, that the Court below applied the law of the State of California in effect at the time of the accident, and in doing so, deprived plaintiff in error of a valid and legal defense, to wit: the defense of assumption of risk. The Court's authority for so doing was the Roseberry Liability and Compensation Law of California heretofore referred to.

The Law of the State of Nevada at the time of the accident and at the time of trial, allowed and permitted the defense of assumption of risk. The

Court's rulings deprived plaintiff in error of this defense.

Had Cunningham been injured in Nevada instead of California, then, without question, this defense would have been available.

At the outset, we direct the Court's special attention to the fact that there is *no evidence in the record of reason or necessity for the commencement and maintenance of this action in the State of Nevada.* On the contrary, it affirmatively appears that the principal office and place of business of the plaintiff in error is in the State of California, and that since December 9, 1911, and at the time of trial (and at the present time), it owned, operated and conducted The Keane Wonder Mine in said State, and that it owned no other property.

In considering this subject, the Court must bear in mind that Federal Courts meet and treat questions of law arising as though they were Courts of the state of their respective jurisdictions. In other words, this Court will determine the question as though the lower Court was a Court of the State of Nevada, and in so doing, will follow the decisions of the highest Court of that state.

Note, 56 L. R. A. 197.

It is likewise elementary that the enforcement of a right given by a statute of a foreign state, in the Courts of a sister state, *is not a matter of strict right, but is a matter of comity,* and therefore defendant in error did not maintain his action in

the Court below as a matter of absolute right, even though pending in a Federal Court, and that under the principles of comity, such action will not be entertained if it would violate the public policy of the forum.

> Ryan v. North Alaska Salmon Co., 153 Cal. 438; 56 L. R. A. 202;
> 11 Cyc. 663, Notes 70, 72, 73.

The Nevada law (Stats. 1911, p. 362) relevant to this inquiry, is an act providing for and relating solely to *"compensation"*, which the act provides in lieu of damages in the usual and ordinary sense; and it is only when the employe seeks his remedy under this act to recover the *"compensation damages"* therein provided, that the employer is deprived of two most important defenses, to wit: (1) assumption of risk; (2) fellow-servant doctrine.

Defendant in error sued to recover *damages* as distinguished from the *"compensation damages"* provided for in both the Nevada and California acts. His action was not brought, nor is it maintained under the Roseberry Act—but by virtue of the general laws of the State of California. The Roseberry Act deprived the master of the defenses referred to, and as a consequence made a radical and fundamental change in the law of that state. As has been ably said:

> *"The change is radical, sweeping, unambiguous, and we must enforce it as written."*
> 75 Fed. 878.

The Nevada act (Sec. 11) applies only when the *employe elects to proceed under its terms and provisions* for the recovery of compensation damages for death or accidental injury.

It is limited in its application, and deals exclusively and refers solely to the indemnity which the act provides shall be recovered by the employe *when he elects to proceed* under its terms; that this act provides and inaugurates, in reference to the subject which it relates, a radical and sweeping change in the law of the State of Nevada, is self-evident; indeed, the very act itself (Sec. 3) recognizes this fact, for it provides:

> *"* * * and to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen."*

The Nevada act does not provide for, or in any way refer to or give to an employe, either directly or indirectly, a cause of action for the recovery of damages in the usual and ordinary sense; nor does the act deprive the employer in such actions of the two defenses so long recognized in the jurisprudence of this country, to wit: (1) assumption of risk; (2) fellow-servant doctrine.

Under the law of the forum, to wit, the law of the State of Nevada, in an action to recover damages for personal injuries, the servant is relegated to the general law on the subject, to wit:

> "Whenever any person shall suffer personal injury by wrongful act, neglect or default of

another, the person causing the injury shall be liable to the person injured for damages."

Vol. 2, Revised Laws of Nevada 1912, Sec. 5649.

Sec. 5650 provides as follows:

"That every * * * mine and mill when actually engaged in mining * * * in the State of Nevada * * * shall be liable to any of its employees * * * for all damages which may result from the negligence of the officers, agents or employees of said * * * mine * * *"

If the change in the law of the State of California is radical and sweeping, certainly it needs no argument that a like effect is produced by the enforcement of this law in Nevada, where there is no such law. If the statute law of Nevada authorizes and permits assumption of risk as a defense, and the California statute denies it as a defense, is not the difference radical and fundamental?

We submit that we have shown a fundamental difference in the laws of the two states, and have conclusively shown that the statute of the foreign state is not similar to the statute law of the forum, but fundamentally different in policy, and contrary to the public policy of the laws of the State of Nevada on the same subject.

As has been said, the enforcement of such a law in a foreign state is not a matter of absolute right, but purely a matter of comity.

56 L. R. A. 202.

We concede some contrariety in the decisions of the various states, but the great weight of authority is aptly expressed as follows:

> "*The decisions of this Court (well sustained by high authority) establish the doctrine that the courts of this state will not undertake to adjudicate rights which originate in another state or country under statutes materially different from the laws of this state in relation to the same subject.*"
>
> O'Riley v. N. Y. Ry. Co., 16 R. I. 388; 19 Atl. Rep. 244.

Among the decisions constituting the weight of authority in this country are the following:

> "Courts of justice in one state will * * * enforce the laws of another state or country when by such enforcement they will not violate their own laws or inflict injury upon their own citizens."
>
> Roblin v. Long, 60 How. Pr. 200.

> "Statutes must be similar to those of the foreign state under which the action arose."
>
> St. Louis Ry. v. Brown, 62 Ark. 254; 35 S. W. 225.

> "There must be no fundamental difference of policy."
>
> Walsh v. N. Y. Ry. Co., 160 Mass 571; 36 N. E. 584; 39 A. S. R. 514.

> "Must not be in contravention of the public policy of the laws of the state."
>
> Delahye v. Heitkemper, 16 Neb. 475; 20 N. W. 385.

"Courts of justice in one state will out of comity assume jurisdiction of causes of action which are transitory in their nature, given by and arising under the statutes of a foreign state, where by so doing they will not violate their own laws."

11 Cyc. 663, note 70.

In determining whether jurisdiction shall be retained and a right given by statute of a foreign state enforced as a matter of comity, courts are guided by well-settled legal principles, one of which being quite sufficient to demonstrate the error of the Court below in denying our motion to dismiss, and is well expresed in the following language:

"*When, however, the cause of action depends upon a statute, the majority of the courts (including the Supreme Court of the State of Nevada) favor the position that there must be a statute in the forum similar to that of the place where the cause of action arose.*"

56 L. R. A. 203;

Texas Ry. v. Cox, 145 U. S. 593;

Burns v. Grand Rapids Ry. Co., 113 Ind. 169; 15 N. E. 230;

Leonard v. Columbian Steam Nav. Co., 84 N. Y. 48; 36 A. R. 481;

Texas Ry. Co. v. Richards, 68 Tex. 375; 4 S. W. 627;

Mexican Ry. v. Jackson, 89 Tex. 107; 31 L. R. A. 276; 33 S. W. 857.

"Some of the courts allude to the similarity of the statutes as merely showing that the en-

forcement of the action in the forum is not against its public policy."

56 L. R. A. 203;

Shedd v. Moran, 10 Ill. App. 618;

Chicago Ry. v. Doyle, 60 Miss. 977;

Lower v. Segal, 59 N. J. L. 66; 34 Atl. 945;

Knight v. West Jersey Ry. Co., 108 Pa. St. 250; 56 A. R. 200

"A few of the cases, however, may be regarded as authority against the necessity of a similar statute in the forum."

56 L. R. A. 204;

Herrick v. Minnesota Ry., 31 Minn. 11; 16 N. W. 413;

Chicago Ry. v. Rouse, 178 Ill. 132;

S. C. Ry. Co. v. Thurman, 106 Ga. 804; 32 S. E. 863;

McLeod v. Conn. Ry., 58 Vt. 727; 6 Atl. 648.

Upon the whole, however, the weight of authority insists that there shall be a statute of the forum similar to that of the place where the cause of action arose.

56 L. R. A. 204.

The following authorities may be referred to in which the statute law of a foreign state was not enforced because different from the law of the forum:

St. Louis Ry. v. McCormick, 71 Tex. 660; 1 L. R. A. 804; 9 S. W. 540;

Bet v. Gulf Ry., 4 Tex. Civ. App. 231; 22 S. W. 1062;

Texas Ry. v. Richards, 68 Tex. 375; 4 S. W. 627;

Patton v. Pittsburgh Ry., 96 Pa. 169;

Mexican National Ry. v. Jackson, 89 Tex. 107; 31 L. R. A. 276; 33 S. W. 857;

Ash v. Baltimore Ry., 72 Md. 144; 19 Atl. 643;

Dale v. Atchison Ry., 57 Kan. 601; 47 Pac. 521;

Matheson v. Kan. City Ry., 61 Kan. 667; 60 Pac. 747.

The Supreme Court of the State of California recognizes the doctrine announced by the great weight of authority.

> "Where the action, as here, is transitory in its nature, a right or liability imposed by the statute of another state or of the United States *may in proper cases be asserted and enforced in this state.*"

Ryan v. North Alaska Salmon Co., 153 Cal. 438.

As hereinabove intimated, the decisions of the Supreme Court of the State of Nevada are in full accord with the weight of authority. In a recent and very ably considered opinion, Judge Norcross held:

> "Courts will enforce a cause of action for death by wrongful act growing out of the laws of another state when not contrary to the public policy of the state of the forum. The public policy of a state in respect to enforcing the remedy in an action for death by wrongful act

> only goes to the extent that it by legislation has changed the common law, and unless the lex fori is substantially the same as the lex loci, the latter law will not be deemed consistent with the public policy of the forum."
>
> Christensen v. Floriston Pulp and Paper Co., 29 Nev. 552; 92 Pac. 210.

The decisions of the highest courts of the two states being in accord with the weight of authority, it inevitably follows that the lower Court erred in retaining jurisdiction of the case after objection made, for the reason that the enforcement of the California statute gave to defendant in error a legal right not granted him by the statute of the State of Nevada.

It is respectfully submitted that the judgment should be reversed, with instructions to the Court below to enter judgment in favor of Keane Wonder Mining Company.

Dated, San Francisco,
January 27, 1915.

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